



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

July 18, 1989

Honorable Paul Gartner
District Attorney
McLennan County
3402 Courthouse Annex
Waco, Texas 76701

Dear Mr. Gartner:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 6636; this decision is OR89-222.

Under the Open Records Act, all information held by governmental bodies is open unless the information falls within one of the act's specific exceptions to disclosure. The act places on the custodian of records the burden of proving that records are excepted from public disclosure. If a governmental body fails to claim an exception, the exception is ordinarily waived unless the information is deemed confidential under the act. See Attorney General Opinion JM-672 (1987). The act does not require this office to raise and consider exceptions that you have not raised.

The McLennan County District Attorney received a request for personnel file information about Mr. Antonio Pina, Assistant District Attorney. You indicate that you provided all of the requested documents except a computer printout produced in response to a criminal history check and handwritten notes on a copy of Mr. Pina's resume. The computer printout is not public, regardless of the fact that it may contain no criminal history information about Mr. Pina. Some of the other information requested was not in Mr. Pina's file. You are under no obligation to obtain information not already in your possession. You ask whether you may withhold the handwritten notes from the resume under section 3(a)(2) of the Open Records Act.

Section 3(a)(2) protects, in pertinent part:

information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; provided, however, that all information in personnel files of an individual employee within a governmental body is to be made available to that individual employee or his designated representative as is public information under this Act.

This section protects personnel file information only if its release would cause an invasion of privacy under the test articulated for section 3(a)(1) of the act. Hubert v. Harte-Hanks Texas Newspapers, Inc., 652 S.W.2d 546, 550 (Tex. App. - Austin 1983, writ ref'd n.r.e.). Information may be withheld under the common-law privacy aspect of section 3(a)(1) only if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. Industrial Found. of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668, 683-85 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Under constitutional privacy tests, the public and private interests are balanced. See Open Records Decision No. 455 (1987).

You indicate that an unknown person made the notations on Mr. Pina's resume at or near the time of Mr. Pina's employment. Although some of the notations could be construed as less than favorable, none of the comments triggers the privacy rights recognized in sections 3(a)(1) and 3(a)(2) of the Open Records Act. For this reason, the notations may not be withheld.

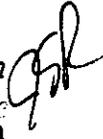
On the other hand, nothing in the act prevents a governmental body from adding a disclaimer to the notations that the governmental body does not believe that the notations are accurate or that the notations do not reflect the governmental body's position. See Attorney General Opinions JM-830 (1987); MW-327 (1981).

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a

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published open records decision. If you have questions
about this ruling, please refer to OR89-222.

Yours very truly,

Open Government Section
of the Opinion Committee 
Open Government Section
of the Opinion Committee
Prepared by Jennifer S. Riggs
Chief, Open Government Section

JSR/bc

Ref.: ID# 6636